IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1356

REV. HERMAN L. DRISKELL, THOMAS R. TRAINER and ROBERT L. MURPHY,

Appellants,

versus

HONORABLE EDWIN W. EDWARDS, Governor, State of Louisiana, HONORABLE WADE O. MARTIN, JR., Secretary of State, State of Louisiana, HONORABLE MARY EVELYN PARKER, Treasurer, State of Louisiana, and HONORABLE DOUGLAS FOWLER, State Custodian of Voting Machines, State of Louisiana,

Appellees.

Appeal from the Three-Judge District Court for the Western District of Louisiana

STATEMENT AS TO JURISDICTION

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No.

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HONORABLE EDWIN W. EDWARDS, Governor, State of Louisiana, HONORABLE WADE O. MARTIN, JR., Secretary of State, State of Louisiana, HONORABLE MARY EVELYN PARKER, Treasurer, State of Louisiana, and HONORABLE DOUGLAS FOWLER, State Custodian of Voting Machines, State of Louisiana,
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STATEMENT AS TO JURISDICTION

STATEMENT OF BASIS UPON WHICH APPELLANTS CONTEND THAT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE "FINAL" JUDGMENT OF THE THREE-JUDGE DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA WHICH IS APPEALED FROM

May It Please the Court:

Pursuant to the authorization of 28 *U.S.C.* 1253 and 2101, and in conformance with Rule 10 of the Rules of the Supreme Court of the United States, Appellants, Reverend Herman L. Driskell, Thomas R. Trainer and Robert L. Murphy, did on February 13, 1976, file a notice of appeal herein with the Clerk of the United States District Court for the Western District of Louisiana, Monroe Division.

Appellants do now file their jurisdictional statement showing that the Supreme Court of the United States has appellate jurisdiction to review upon appeal the Judgment of the Three-Judge District Court, which became final on January 15, 1976. See Appendix E.

I.
THE OPINIONS BELOW

The opinion of the United States District Court for the Western District of Louisiana sitting as a Three-Judge Court is not yet reported. It is printed as appendix E to this statement. Earlier opinions are Driskell, et al. vs. Edwards, et al., 374 F. Supp. 1 (1974); Driskell, et al. vs. Edwards, et al., 419 U.S. 812, 95 Sup. Ct. 26, 42 L. Ed. 2d 38 (1974), see Appendix B; Driskell, et al. vs. Edwards, et al., unreported, W. D. La. 1974, November 5, 1974, see Appendix C; and Driskell, et al. vs. Edwards, et. al., 518 F. 2d 890 (C. A. 5, 1975) see Appendix D.

II.
STATUTE SUSTAINING JURISDICTION

The statute believed to sustain appellate jurisdiction is Section 1253 of Title 28 of the United States

Code, which provides that "[e]xcept as otherwise provided by law, any party may appeal to the Supreme Court from any order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit, or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

III.
STATUTE THE VALIDITY OF WHICH IS INVOLVED

The statute of the State of Louisiana, the validity of which is involved in this case, is ACT NO. TWO (2) of 1972 of the Louisiana Legislature, as amended by ACT NO. FIFTEEN (15) of the 1973 extra session of the Louisiana Legislature (the complete text of which is to be found in West's Louisiana Statutes Annotated — Constitution, Pocket Part to Volume 1, pages 5-10 and West Publishing Company Supplemental Pamphlet thereto).

Pursuant to Rule 15.1(b)(v), since the statutory provisions are lengthy, the citation only is submitted at this point, and the pertinent portion of the text of Act No. 2 of 1972, as amended, of the Louisiana Legislature is set forth as Appendix A hereto.

Act No. 2 made provision for calling a Louisiana Constitutional Convention to be convened at Baton Rouge, Louisiana, on January 5th, 1973, for the purpose of framing a new constitution for the State of Louisiana to replace the Louisiana Constitution of 1921.

Act No. 2 of 1972 provided that the 1973 Louisiana Constitutional Convention would consist of a TOTAL OF ONE HUNDRED AND THIRTY-TWO (132) Delegates, of which ONE HUNDRED AND FIVE (105) Delegates were to be ELECTED by qualified electors voting in their respective election precincts by Districts from which members of the House of Representatives of the Louisiana Legislature are elected, PLUS TWENTY-SEVEN (27) Delegates appointed by the Governor of Louisiana to represent twelve (12) preferred special interest groups and fifteen (15) delegates from the public at large. Thus, in effect, the Governor of Louisiana appointed approximately TWENTY-ONE PERCENT of the total voting strength of the 1973 Louisiana Constitutional Convention.

This suit involves specifically the validity of the provisions of the third paragraph of Section 1 A(1), quoted as follows:

> "One delegate shall be appointed by the governor to represent each of the following: industry, labor, education, civil service, wildlife and conservation, law enforcement, the judiciary, the professions, consumers, agriculture, youth and racial minorities. Fifteen additional delegates shall be appointed by the governor from the public at large."

The final draft of a new Louisiana Constitution, as prepared by the 1973 Louisiana Constitutional Convention, was submitted to and adopted by a majority vote of the participating electors at a special election held on April 20th, 1974. The Constitution became effective at midnight on December 31st, 1974. The

validity of this Constitution is also involved in this case.

IV.
EFFECTIVE DATE OF JUDGMENT AND APPLICATION FOR APPEAL

The judgment of the Three-Judge District Court here appealed was initially issued by judgment rendered on January 15th, 1976, Appendix E hereto.

Appellants' petition and notice of appeal was dated and presented on February 13, 1976, to the Clerk of the District Court for the Western District of Louisiana as provided in Rule 10 of the Rules of the Supreme Court of the United States. See Appendix F.

V.
NATURE OF CASE AND RULINGS OF COURT TO BRING CASE WITHIN THE JURISDICTIONAL PROVISIONS RELIED UPON; AND STAGE IN PROCEEDINGS WHEN FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED; QUESTIONS RAISED; AND HOW PASSED ON.

A. On April 5th, 1974, the Appellants filed suit in the United States District Court for the Western District of Louisiana seeking a declaratory judgment that Act No. 2 of the 1972 Louisiana Legislature, setting forth the manner of convening and the composition of a state constitutional convention, was void in that its method of delegate selection failed to comply with the "one man, one vote" doctrine. Appellants requested that injunctive relief be granted to prevent the

scheduled election to submit the new state constitution, which had been framed by a convention constituted pursuant to Act 2, to the voters for ratification and sought to enjoin the expenditure of funds thereunder.

B. The Appellants raised the following federal questions:

(1) That under Article IV, Section 4 of the United States Constitution, which guarantees to each state a republican form of government, state constitutional conventions must be composed, in their entirety, of delegates elected by the people to represent their interests in the solemn task of drafting the constitution under which they will be governed.

(2) That Act No. 2 of 1972 deprived Appellants, and others in their class, of their right to equal protection of the laws accorded them by the FOURTEENTH AMENDMENT through debasement of their votes for delegates to the 1973 Louisiana Constitutional Convention, since the appointment by the Governor of Louisiana of TWENTY-SEVEN (27) out of a total of ONE HUNDRED AND THIRTY-TWO (132) Delegates, in effect, diluted and offset the votes of TWENTY-SEVEN (27) of the ONE HUNDRED AND FIVE (105) elected delegates.

(3) That a state constitutional convention exercises the most fundamental legislative and governmental function, *i.e.*, the determination of the nature of the foundation of state government; that, consequently, the "one man, one vote" doctrine enunciated in *Baker v. Carr*, 369 U.S. 186 (1962), applies to

the selection of delegates to such a convention, and that the appointment of the TWENTY-SEVEN (27) delegates contravened that doctrine.

(4) That the giving of extra delegates of certain special interest groups constituted invidious discrimination.

C. In a memorandum opinion and order dated April 10, 1974, the District Judge held that: (i) no three-judge court was necessary because no substantial federal constitutional question was presented; (ii) injunctive relief was inappropriate; and (iii) the defendant's motion for summary judgment should be granted. See *Driskell et. al. vs. Edwards et. al.*, 374 F.Supp. 1 (1974)

D. Appellants applied successively to Justices Powell and Douglas for an injunction against the impending election, which requests were denied.

E. Appellants then appealed to the Supreme Court. The Supreme Court vacated the judgment and remanded the case to the District Court and ordered that Court to enter a new decree from which an appeal could be taken to the Court of Appeals. The new order was issued and an appeal taken to the Fifth Circuit Court of Appeals. See *Driskell et. al. vs. Edwards, et. al.*, 419 U.S. 812, 95 Sup.Ct. 26, 42 L.Ed.2d 38 (1974), Appendix B, see Also Appendix C.

F. The Court of Appeals held, in *Driskell v. Edwards*, 518 F.2d 890 (1975), that the case presented substantial constitutional questions which required the calling of a Three-Judge Court. The case was remanded to the District Court for determination by a

Three-Judge Court whether Act 2 of 1972 violated the United States Constitution. See Appendix D.

G. After the Three-Judge Court was constituted, Judge Edwin F. Hunter, Jr., of the Western District of Louisiana, recused himself since he had rendered the original opinion dismissing the complaint. Judge Ben C. Dawkins was appointed to take his place. Appellants requested the recusal of the three judges on grounds that since all three judges were citizens of Louisiana subject to the new Constitution, they would be unable to render an impartial decision. Judge Ben C. Dawkins had recused himself when the original complaint and request for injunctive relief were presented to him on April 5, 1974. The request for recusal was denied.

In the Three-Judge Court, the Appellants sought to have Act 2 of 1972 of the Louisiana Legislature and the Louisiana Constitution of 1974, drafted pursuant to that Act, declared unconstitutional and null and void *ab initio*. Appellants also sought to enjoin enforcement of that Constitution.

The Three-Judge Court held that the "one man, one vote" principle did not apply to state constitutional conventions on the ground that such conventions do not exercise legislative functions. Consequently, the Court dismissed the complaint.

The judgment of the Three-Judge Court became final on January 15, 1976, *see* Appendix E hereto, and Appellants' appeal to the Supreme Court of the United States was filed on February 13, 1976, *see* Appendix F hereto.

H. The appeal is brought under authority of 28 *U.S.C.* Sec. 1253. It was held in *Oldroyd v. Kugler*, 461 F.2d 534 (3d Cir. 1972), that where injunctive relief was requested in the complaint, a dismissal on the merits by a three-judge court was sufficient to effect a judgment appealable to the Supreme Court under Section 1253. In *Schneider v. Smith*, 390 U.S. 17 (1968), the Supreme Court itself took jurisdiction in a similar situation. Likewise, in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), the Court found that the fact that the three-judge court dismissed an action for lack of subject-matter jurisdiction did not preclude the Supreme Court's direct appellate jursidiction. The fact that the prior judgment did not specifically deny injunctive relief was found to be irrelevant.

Thus, in the present case, since the Appellants specifically requested injunctive relief on the face of their complaint, the Three-Judge Court's dismissal constitutes a final judgment directly appealable to the Supreme Court under Section 1253.

J. Appellants append to this Jurisdictional Statement as Appendix E copies of the opinion of January 15, 1976, of the Three-Judge District Court for the Western District of Louisiana. There are no other opinions of that Three-Judge Court in this case or in any companion cases. Earlier opinions in the same case are contained in Appendices B, C, D, and E hereto. The earliest opinion is *Driskell et. al. vs. Edwards et. al.*, 374 F.Supp. 1 (W.D. La. 1974)

VI.
QUESTIONS PRESENTED ON APPEAL

(1) Does Act No. 2 of 1972 of the Louisiana Legislature, which provides that state constitutional

conventions be composed of Twenty-Seven (27) delegates appointed by the Governor of Louisiana and One Hundred and Five (105) delegates elected by the people of that state, violate the principle of "one man, one vote" recognized by this Court in *Baker v. Carr*, 369 U.S. 186 (1962), to be a constitutional requirement imposed by the Fourteenth Amendment?

(2) Does Act No. 2 of 1972 of the Louisiana Legislature violate Article IV, § 4 of the United States Constitution, which guarantees to every state a republican form of government?

VII.
GROUNDS FOR CONTENTION THAT QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION.

The questions presented by this Appeal deserve plenary consideration by the Supreme Court of the United States since they present substantial constitutional issues on which several federal three-judge courts, as well as various state courts, have reached conflicting conclusions. These questions are:

(1) Does Act No. 2 of 1972 of the Louisiana Legislature, which provides that state constitutional conventions be composed of Twenty-Seven (27) delegates appointed by the Governor of Louisiana and One Hundred and Five (105) delegates elected by the people of that state, violate the principle of "one man, one vote" recognized by this Court in *Baker v. Carr*, 369 U.S. 186 (1962), to be a constitutional requirement imposed by the Fourteenth Amendment?

(2) Does Act No. 2 of 1972 of the Louisiana Legislature violate Article IV, § 4 of the United States Constitution, which guarantees to every state a republican form of government?

Appellants urge that the "one man, one vote" principle properly applies to state constitutional conventions which draft the most basic legislative document by which a state is governed, and that Act No. 2 violates that principle so that any constitution adopted pursuant to its provisions is null and void *ab initio*. Several three-judge federal courts and a number of state courts have considered this issue and have reached conflicting results. Since the question is one which will continue to arise with some regularity, Appellants request that the Supreme Court resolve this issue so as to provide guidance in the future. Appellants further urge that the proper foundation for the republican form of government, guaranteed by Article IV, § 4, may only be laid by an elected body, properly apportioned, which will fully represent the interests of the people in the process of drafting their state constitution.

I. The principle that delegates to state constitutional conventions must be properly elected is a well established one, accepted by numerous scholars and commentators. Thus, John P. Wheeler, in *The Constitutional Convention: A Manual on Its Planning, Organization and Operation*, prepared in 1961 for the National Municipal League, stated that "[d]etermining the apportionment of delegates can be the most important action in the whole process of constitutional revision by convention," and advised that "the most that can be done is to aim toward a system

which best . . . implements the principle of 'one man-one vote.' " *Id.* at 33.

The Supreme Court of Rhode Island, in *In re Constitutional Convention*, 55 R.I. 46, 178 A. 433, 438 (1935), reviewed the then-existing jurisprudence on this subject and found it to be universally accepted that:

> "A constitutional convention is an assembly of the people themselves acting through their duly elected delegates. The delegates in such an assembly must therefore come from the people who chose them for this high purpose and this purpose alone. They cannot be imposed upon the convention by any other authority. Neither the legislature nor any other department of the government has the power to select delegates to such a convention. The delegates elected by and from the people, and only such delegates, may and of right have either a voice or a vote therein."

A more recent Rhode Island decision, *Opinion to the House of Representatives*, 208 A.2d 116 (R.I. 1965), has reaffirmed the principles established in this earlier case.

Recently, a spate of cases on this point has arisen in both state and federal courts and have resulted in conflicting decisions which have thrown this area of jurisprudence into confusion. The central issue in these cases is the question of whether the "one man, one vote" principle should apply to state constitutional conventions, thus requiring that delegates

be elected and fairly apportioned according to population.

In *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 56 (1970), the Supreme Court held that:

> "[A]s a general rule, whenever a state or local government decides to select persons by popular elections to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as practicable, that equal numbers of voters can vote for proportionally equal numbers of officials."

In the present case, the Louisiana Legislature decided that members of the constitutional convention would be chosen by popular election. Therefore, if the convention performed a "governmental function," the principle of "one man, one vote" would apply and would preclude the appointment of delegates whose votes would dilute the votes of properly elected delegates.

It is well established that constitutional conventions do perform "governmental functions." No function could be more governmental than the drafting of the document which established the form of govern-

ment itself. Both the Fifth Circuit Court of Appeals and the Three-Judge District Court in this case have recognized this fact. However, in *Wells v. Edwards*, 347 F. Supp. 453 (W.D. La. 1972), the district court interpreted the *Hadley* decision as applying only to elected officials who perform legislative or executive duties. The prime consideration, therefore, is whether state constitutional conventions, and the Louisiana Constitutional Convention in particular, perform "legislative functions."

In *Frantz v. Autry*, 18 Okla. 561, 91 P. 193, 204 (1907), it was held that:

> "A constitutional convention is a legislative body of the highest order. It proceeds by legislative methods. Its acts are legislative acts . . . . That the consent of the general body of electors is required to give effect to the ordinances of the convention no more changes their legislative character than the requirement of the Governor's consent changes the nature of the action of the Senate and Assembly."

Similarly, in *Goodrich v. Moore*, 2 Minn. 61 (Gil. 49), 72 Am. Dec. 74 (1858), the Supreme Court of Minnesota recognized that a constitutional convention is a legislative assembly empowered to promulgate the supreme law of the state. A similar conclusion was reached by the Supreme Court of Mississippi in *Sproule v. Fredericks*, 69 Miss. 898, 11 So. 472 (1892).

A number of recent state cases have adopted the principles set forth in these three older cases as

guidelines in their treatment of the question of apportionment of state constitutional conventions. Courts in Maryland, Montana, New Jersey, and West Virginia have found that the principles of apportionment do apply to state constitutional conventions.

In *Jackman v. Bodine*, 43 N.J. 453, 205 A.2d 713 (1964), the New Jersey courts held that constitutional conventions must be elected and apportioned according to population. The court did not deal directly with the "legislative functions" distinction. However, the Maryland courts did so in *Board of Supervisors for Election for Anne Arundel County v. Attorney General of Maryland*, 246 Md. 417, 229 A.2d 388 (1967). In that case, the court approved the principle that delegates to a state constitutional convention must be elected and equally apportioned. With regard to the "legislative functions" argument, the court noted that a constitution is a "fundamental legislation" which can only be rewritten by direct agents of the people chosen specifically for that purpose. The court pointed out particularly that the Governor must obey the will of the people in this respect, rather than the converse.

The Supreme Court of Montana, in *Forty-Second Legislative Assembly v. Lennon*, 156 Mont. 416, 481 P.2d 330, 334 (1971), found that:

> "A delegate to the constitutional convention exercises sovereign powers of a legislative character of the highest order."

The court found that the constitutional convention in question must be properly apportioned on the basis of the 1970 census.

Perhaps the most illuminating opinion on this point is *State v. Gore*, 150 W. Va. 71, 143 S.E.2d 791 (1965), which, although it deals with the West Virginia rather than the United States Constitution, offers a convincing analogy. The court in that case held that even though a constitutional convention may not fit precisely into one of the three branches of government, it is so essential to the governing process that every citizen is entitled to equal representation therein. Delegates to such conventions must be elected and fairly apportioned. The court rejected the argument, accepted by some state courts, that equal representation is not required in constitutional conventions because the work of such bodies is subject to ratification by the people:

> "[T]he mere right to approve or disapprove a proposed constitution does not afford to the general public a voice in the formulation thereof. The people are entitled to equal representation when it is determined what that solemn document shall contain, not merely to a bare right of veto."

143 S.E.2d at 795. The logic of this position should be self-evident. Mere right to veto does not insure fair representation of the people in determining the actual contents of a constitution. The area within which the electorate can exercise its preferences is substantially circumscribed by such a system.

The principle established by the nine state cases just discussed is that a constitutional convention is a legislative body which exercises the most fundamental legislative function, that of framing the paramount law of the state. Consequently, under the decisions in *Wells*, *supra*, and *Hadley*, *supra*, the "one man, one vote" requirement of the fourteenth amendment should apply.

Four state cases, *West v. Carr*, 212 Tenn. 367, 370 S.W. 2d 469 (1963), *cert. denied*, 378 U.S. 557 (1964); *Stander v. Kelley*, 403 P. Super. 406, 250 A.2d 474 (1969), *cert. denied*, 395 U.S. 827 (1969); *Livingston v. Ogilvie*, 43 Ill. 2d 9, 250 N.E.2d 138 (1969); and *Bates v. Edwards*, 294 So. 2d 532 (La. 1974), have taken opposing positions on the ground, rejected in *State v. Gore*, that since the people must ratify the product of constitutional conventions, equal representation is not required in the convention itself. There was a strong dissent written by Justice Cohen in the *Stander* case, which reiterates the principle that constitutional conventions must represent the people, who alone have power to rewrite their constitution, and must be fairly apportioned. Justice Cohen found that the presence of certain non-elected delegates in the constitutional convention violated this principle and precluded equality of representation.

The lack of agreement among state courts is echoed by similar disagreement among several federal three-judge courts which have reviewed the question of whether the "one man, one vote" principle should apply to state constitutional conventions. In *Butterworth v. Dempsey*, 237 F. Supp. 302 (D. Conn. 1965), the

federal three-judge court held that the membership of a state constitutional convention must be determined "in accordance with standards required by the United States Constitution," *i.e.*, the "one man, one vote" principle. Similarly, in *Toombs v. Fortson*, 205 F. Supp. 248 (N.D. Ga. 1962), a three-judge court indicated that if a constitutional convention were called in order to change the constitution, such convention must be based on population as near as practicable, with the members being elected by the people, thus applying the "one man, one vote" principle.

The *Fortson* case was appealed to the Supreme Court, *Fortson v. Toombs*, 379 U.S. 621 (1965), and decision was rendered on the narrow issues of the proper extent of injunctive relief and whether the issue of relief had become moot. Much has been made, by the appellees, of Justice Harlan's statement in his concurrence and dissent that the "one man, one vote" principle should not apply to constitutional conventions. It need only be pointed out that Justice Harlan *was* in dissent on this point, and that his position was not then and has never been adopted by a majority of the Supreme Court. The majority in *Fortson* confined itself solely to the issue of relief, although, had it been so inclined, it could have reversed the lower court's finding on the question of representation in constitutional conventions. Further, a careful reading of *Fortson* indicates that Justice Harlan misinterpreted that case to stand for the proposition that constitutions could only be drafted by constitutional conventions. In fact, the holding was that regardless of whether the document were drafted by convention or by the legislature, the drafting body must be composed of elected and fairly apportioned representatives.

The holding of the three-judge court in the present case that fourteenth amendment protections do not apply to constitutional conventions is, then, in conflict with the holdings of the three-judge courts in *Butterworth* and *Fortson*. In addition, it appears to conflict with the decision of the Seventh Circuit in *Weisberg v. Powell*, 417 F.2d 388 (7th Cir. 1969). *Weisberg* held that candidates for election to a state constitutional convention had equal protection rights under the fourteenth amendment which had been infringed by the state election procedures. The clear implication is that states do not have plenary power over selection of delegates to state constitutional conventions, but are subject to the strictures of the fourteenth amendment. The conflict among federal courts created by these decisions should be resolved, as it is likely to be implicated in future decisions.

The resolution of this conflict may be facilitated to some extent by resort to analogy. Most helpful is the analogy to political nominating conventions. Like constitutional conventions, such conventions are an essential ingredient of our governmental process (if anything, a constitutional convention is far more basic to our form of government). The choice of a nominee, like the draft of a constitution, is subject to the "ratification" of the voters. It had been held in several cases that the "one man, one vote" principle applies to the selection of delegates to national presidential conventions. *Ripon Society, Inc. v. National Republican Party*, 369 F. Supp. 368 (D.D.C. 1974); *Doty v. Montana State Democratic Committee*, 333 F. Supp. 49 (D. Mont. 1971); *Maxey v. Washington State Democratic Committee*, 319 F. Supp. 673 (W.D. Wash. 1970). Similar reasoning has been applied to the

selection of state convention delegates who nominate candidates for office and select delegates to the national convention. *Redfearn v. Delaware Republican State Committee*, 362 F. Supp. 65 (D. Del. 1973). By analogy, then, the "one man, one vote" principle should also apply to constitutional conventions.

In addition, the considerations which underlie the decision in *Wesberry v. Sanders*, 376 U.S. 1 (1964), that the "one man, one vote" principle must govern congressional elections, are equally applicable in the present situation. The thrust of *Wesberry* is that all persons have the right to an equal voice in the election of those persons who determine the powers and structure of their government and the laws which will govern them. Nothing could be more basic to the exercise of this right than the power to elect the delegates to constitutional conventions who do, in fact, frame the most fundamental structure of the government. The right to elect legislators is severely limited where there is not concomitant right to representation in the body which determines the power which those legislators will have and the structure of government under which they must operate.

The foregoing discussion is directed to the question of whether the "one man, one vote" principle should apply to state constitutional conventions in general. There are additional reasons why the doctrine should apply to the 1973 Louisiana Constitutional Convention in particular, since that convention not only drafted a new constitution, but did, in fact, enact "legislation" in every sense of that word. The convention provided that on the date that the new constitution

became effective, over 200 sections of the prior constitution would take effect *as legislative acts*. The enactment of statutes is clearly a legislative function which must be subjected to the "one man, one vote" requirement. Defendant Wade O. Martin, Jr., has stated that the actions of the convention plainly constituted an attempt to legislate. Consequently, the requirements of the fourteenth amendment should have applied.

Given that the "one man, one vote" principle applied to the Louisiana Constitutional Convention, there has been a clear violation of that principle. The appointment of the twenty-seven delegates representing the special interest groups violated the requirement that all representatives be elected, and gave disproportionate representation to those interest groups. The grant of disproportionate representation to such groups has been prohibited as hostile to the "one man, one vote" principle. *Abate v. Mundt*, 403 U.S. 182 (1971); *Moore v. Ogilvie*, 394 U.S. 814 (1969). It has also been held to constitute a violation of equal protection to minimize or cancel the voting strength of any political element. *Whitcomb v. Chavis*, 403 U.S. 124 (1971). In the present case, the votes of twenty-seven (27) elected delegates were, in effect, cancelled out by the votes of the appointed delegates.

In the 1973 constitutional convention, the Governor not only appointed the statutory twenty-seven (27) delegates; he also appointed four (4) delegates to replace elected delegates. In total, then, the Governor appointed thirty-one (31) of the one hundred and thirty-two (132) delegates, or almost 25% of the voting

strength of the convention. This necessarily minimized the voting strength of the elected delegates and conferred disproportionate voting strength on certain elements of the electorate. In addition, it gave the Governor vast influence over the final work product of the convention. A practical view of the appointment process indicates that appointees to such posts will be persons whom the Governor has found to be congenial to his partisan policies. Through those delegates, who by their very number will have great influence over the convention, the Governor may embody such policies in the constitution. Such vast influence by a partisan political figure is not only violative of the "one man, one vote" principle, but of the concept of representative government.

The ratification of the 1974 constitution by the voters of Louisiana cannot mend the constitutional violation present at its inception. It was held in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), that constitutional rights cannot be submitted to vote. In *Lucas v. 44th General Assembly of Colorado*, 377 U.S. 713 (1964), a state constitutional amendment apportioning the state legislature was declared invalid even though ratified by the voters. The Court found that an individual's constitutional right to an equal vote could not be abridged even by vote of a majority of the electorate. The Louisiana courts have similarly held. *Graham v. Jones*, 198 La. 507, 3 So. 2d 761 (1941).

The Louisiana Constitution of 1974 was promulgated by a body which failed to meet the constitutional requirements of the fourteenth amend-

ment as formulated in the "one man, one vote" principle. Consequently, that constitution was unconstitutional and null and void *ab initio* and could not be subsequently rendered constitutional by the vote of a mere TEN PERCENT (10%) of the people of Louisiana who chose to ratify it at the election on April 20, 1974.

II. Article 4, Section 4 of the Constitution provides:

> "The United States shall guarantee to every state in this Union, a Republican Form of Government. . . ."

As a practical matter, the "form" of state government is established by the state constitution. The allocation of power, structure of the government, and basic principles guiding the exercise of governmental functions are all established by that single, fundamental document. In order to assure that the government so established is republican in form, it is necessary to assure proper and equal representation of all of the voters in the convention which drafts the constitution.

The United States Congress itself recognized the importance of this assertion when, in 1811, it enacted the ENABLING ACT for the admission of Louisiana to the Union. 2 U.S. Stat. 641. The Enabling Act provided that the first Louisiana constitutional convention must be entirely composed of delegates elected by the registered voters and apportioned among the several districts and parishes. This Act, accomplished only twenty-three (23) years after the adoption of the United States Constitution, indicates Congress' profound and continuing concern that the people, through their

elected representatives, should control the promulgation of the constitution under which they are governed. The same concern is evident in the writings of many of the founding fathers.

As Congress has thus indicated, and as logic dictates, a government must be representative in order to be republican. State government is based on the state constitution which must, therefore, be formulated by a representative body. There can be no place in such a body for substantial numbers of appointed delegates subject to the influence of the partisan political figure, the Governor, who appointed them. An Act which requires the presence of such delegates, therefore, contravenes the intent of Article IV, § 4 to ensure a republican form of government to every state. *Cf. Baker v. Carr, supra.*

CONCLUSION

An examination of the cases decided on the question presented in this case reveals a conflict among the various state and federal courts as to whether the "one man, one vote" principle properly applies to state constitutional conventions. Since this question has arisen with some frequency in recent years and is likely to continue to do so in the future, it is imperative that this Court fully review and resolve this substantial constitutional question.

The appellants believe that such a full review will indicate that the "one man, one vote" principle does apply to constitutional conventions in general and to the Louisiana Constitutional Convention of 1973 in

particular. Constitutional conventions exercise both the highest and most fundamental of all legislative functions; they determine the structure of state government and the allocation of powers therein. Their decisions cannot effectively be revised by an electorate which is granted only the bare right to veto. In this case, particularly, the convention in fact enacted statutes just as any legislative body would do. Because of the nature and importance of the functions performed by constitutional conventions, they should be subjected to the requirements of the fourteenth amendment in order to assure the full and equal participation of the people in the formulation of their government and to assure to each state the republican form of government guaranteed by Article IV, § 4 of the United States Constitution.

Appellants pray that this Honorable Court protect their constitutional rights as Louisiana citizens by reversing and setting aside the judgment of the Three-Judge District Court for the Western District of Louisiana, by declaring Act No. 2 of 1972 of the Louisiana Legislature (as amended) to be unconstitutional, and by declaring the Louisiana Convention of 1973 null and void *ab initio*. The appellants further pray that the appellees, Honorable Edwin W. Edwards, Governor, State of Louisiana; Honorable Wade O. Martin, Jr., Secretary of State, State of Louisiana; Honorable Mary Evelyn Parker, Treasurer, State of Louisiana; and Honorable Douglas Fowler, State Custodian of Voting Machines, State of Louisiana, be enjoined from implementing, applying, or enforcing the 1974 Louisiana Constitution or from expending any funds thereunder.

It is vouchsafed that this Honorable Court possesses jurisdiction of this appeal, and that wisdom and public policy will be well served by the exercise of jurisdiction.

Respectfully submitted,

Jerry L. Finley
Bradley Building, Suite A
401 North Third
Monroe, Louisiana 71201
Telephone (318) 323-8291

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing jurisdictional statement in this appeal have been served upon defendants by depositing three copies of the same, postage prepaid in the U.S. Mails, addressed to their attorney of record, Robert G. Pugh, Special Assistant Attorney General and Special Counsel, 720 Commercial National Bank Building, Shreveport, Louisiana, on this ____ day of March, 1976.

Jerry L. Finley

APPENDICES

ACT 2 of 1972

Relating to

Constitutional Convention

Issued by

WADE O. MARTIN, JR.

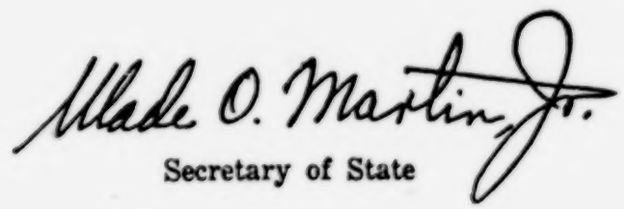
Secretary of State

PREFACE

As provided by Act 2 of the 1972 session of the Louisiana Legislature, a Constitutional Convention will be held in Baton Rouge, beginning January 3, 1973. Attending the Convention will be 105 elected delegates, coming from the same Districts as the members of the State House of Representatives.

Candidates for election as delegates to the Convention must qualify with the office of Secretary of State (State Capitol, Baton Rouge) no later than the close of business on July 19, 1972, and will run in the primary election of August 19, 1972, to be held under the state's general election laws. Candidates must be bona fide residents and qualified electors of the Districts in which they run. Party affiliation will not be a consideration, and there are no qualifying fees.

In accordance with the state's general election laws, candidates will not be assigned numbers on the ballots in the election. In order to be elected to the Convention, those running must receive from their Districts a majority of the votes cast. In cases where no majority is received in the August election, a run-off between the two top candidates in those Districts will be held at the General Election of November 7, 1972.



Secretary of State

ACT No. 2

House Bill No. 181.

By: Messrs. McLeod, LeBreton, Guidry, Triche, Hollins, M. J. Laborde, Bares, Booker, Borrello, Brady, Breaux, Brinkhaus, T. A. Casey, Chabert, Charbonnet, LeBleu, Martin, Abadie, Accardo, Ackal, Alario, Angelle, Anzalone, Christian, Connor, Cooper, Crisler, Deen, D'Gerolamo, Dischler, Doucet, Dunn, Dupuis, Ensminger, Folkes, Fowler, Fox, Freeman, Gaudin, Grisbaum, Gunter, Hainkel, Hebert, Humphries, A. Jackson, John, Jones, R. J. Laborde, Lancaster, Landry, LeBlanc, Leithman, Long, Marchand, Marullo, Munson, Randolph, Reilly, Rice, Robillard, Schmitt, Scogin, Shannon, Sheridan, Simon, Stephenson, Strain, Tauzin, M. Thompson, R. S. Thompson, Toca, Turnley, Ullo, Womack, Mills, Lottinger, Bagert and Henry and Mrs. Johnson and Senators Carter, Williamson, Jones, W. D. Brown, Bauer, Blair, C. M. Brown, J. H. Brown, DeBlieux, Duplantier, Duval, Dykes, Fontenot, Foshee, Gerald, Guillory, Hardy, Hickey, Jumonville, Kiefer, Kilpatrick, Knowles, Montgomery, Mouton, Nicholson, Osterberger, Peltier, Poston, Tassin, Tiemann and Windhorst.

AN ACT

To provide for the holding of a constitutional convention for the purpose of framing a new constitution; to fix the time and place for said convention; to provide for the qualifications and election or appointment of delegates thereto; to provide for the organization and staff of the convention; to place restrictions on said convention; to require the constitution as drafted and adopted by such convention,

including any alternative provisions, to be submitted to the qualified electors for adoption, to provide the manner of such submission, and to provide with respect thereto; to fix penalties for violations in connection with the holding of elections; to provide with respect to the disbursement of the funds appropriated for the convention and for the retention thereof; to fix the effective date of the new constitution if approved by the electorate, and otherwise to provide with respect to said convention and the constitution prepared by it.

Be it enacted by the Legislature of Louisiana:

Section 1. A. (1) A constitutional convention is hereby called, to convene on January 5, 1973 at 12:00 o'clock noon, which shall be held for the purpose of framing a new constitution for the state of Louisiana, subject to the terms, conditions and provisions hereinafter set forth.

There shall be one hundred thirty-two delegates to the convention. One delegate shall be elected from each of the districts from which members of the House of Representatives of the Louisiana Legislature were elected at the last election for members of that body. One delegate shall be appointed by the governor to represent each of the following: industry, labor, education, civil service, wildlife and conservation, law enforcement, the judiciary, the professions, consumers, agriculture, youth, and racial minorities. Fifteen additional delegates shall be appointed by the governor from the public at large.

(2) Each delegate to the convention shall be an elector of the state of Louisiana, shall be at least eighteen years of age and shall be a resident of the state of Louisiana. In addition, each delegate elected from a representative district shall be a resident of the district from which he is elected at the time he qualifies as a candidate for election as a delegate. Any public official of the governmental subdivisions of the state, whether holding office by election or appointment, if otherwise qualified, shall be eligible for election or appointment as a delegate to the convention.

(3) The election or appointment of any public official as a delegate to the convention and his service in the convention, or the appointment of any public official to the staff of the convention and his service on such staff, as authorized and provided in this Act, shall not be construed to constitute dual office holding within the prohibitions of the laws of the state. Provided, however, delegates elected from the representative districts shall be considered state elected officials within the scope of and subject to the provisions of Part III of Chapter 15 of Title 42 of the Louisiana Revised Statutes of 1950, and all delegates and members of the staff who are not elected officials shall be considered as state employees within the

scope of and subject to the provisions of Part II of Chapter 15 of Title 42 of the Louisiana Revised Statutes of 1950, and provided further, that both the delegates to the convention and the staff of the convention shall be subject to the public bribery provisions of the laws of this state.

(4) Any attorney at law serving as a delegate to the convention shall be entitled to the absolute right of the continuance of any case in which he is bona fide counsel of record in any court of the state during his attendance upon the sessions and work of the convention.

B. (1) The election for the one hundred five delegates to the convention to be elected from representative districts shall be held at the congressional election to be held on Saturday, August 19, 1972. The governor shall make proclamation and give notice of the election to be held under this section not less than forty-five days before the date of said election as herein fixed. Each person desiring to become a candidate for election as a delegate from a representative district shall qualify as a candidate from the particular representative district he seeks to represent by filing a statement of candidacy with the secretary of state not later than July 19, 1972. Qualification as a candidate shall be without regard to party affiliation. Except as herein otherwise provided, the election for which provision is hereinabove made shall be conducted and the results thereof published and promulgated in accordance with the general election laws of the state. All qualified electors shall be entitled to vote in the election in their respective election precincts and without regard to party affiliation.

(2) Delegates shall be elected by the qualified electors participating in the election. The candidate receiving a majority of the total vote in each district and candidates who are unopposed shall be declared elected. In the event no candidate receives a majority of the votes cast on August 19, 1972, a run-off between the two candidates with the highest number of votes shall be held on Tuesday, November 7, 1972. The candidate receiving the highest number of votes cast in the run-off shall be declared elected. In the event more than one candidate receives the highest number of votes in a district, the candidates in that district who have received the same number of votes, that number being the highest number of votes in the district, shall, under the supervision of the Board of Supervisors of Election, draw lots to determine who shall be elected as a delegate. If one of such candidates dies or withdraws the remaining candidates who received the same number of votes in the district shall draw lots and if only one such candidate remains he shall be declared elected.

Section 2. A. At the election for the one hundred five delegates to the constitutional convention elected from representative districts, it shall be the duty of the commissioners and the

clerks of election to tabulate correctly and to make return of the legal vote cast therein the same as in the case of any candidate for any office.

B. Whoever violates the provisions of this section by intentionally making false, fictitious or fraudulent returns on the election of delegates to the convention, upon conviction, shall be imprisoned for not less than two years nor more than five years. Any fraudulent vote by a voter at the election of delegates shall subject said voter to prosecution and punishment as provided in the general election laws of the state. All other offenses, prosecutions, penalties and punishments arising out of or in connection with the elections provided for by this Act shall be governed by the existing applicable laws of the state.

Section 3. In the event of the death, inability or unwillingness of any elected delegate elected from a representative district to serve, whether before or during the convention, the governor shall fill such vacancy by the appointment of a person from the same representative district who possesses the qualifications hereinabove provided for delegates. In the event of the death or the inability or unwillingness to serve of any other delegate, the vacancy shall be filled in the same manner as the original appointment.

Section 4. The convention shall have full authority to frame a new constitution for the state, including such alternative provisions as it deems appropriate, which shall be submitted to the electors of the state for their approval or rejection; however, the convention is prohibited from framing any article or provision whereby:

(1) The bonded or other indebtedness of the state or of any parish, municipality, district or other political subdivision or authority of the state shall be impaired;

(2) The terms of office of the members of the legislature or of any other elected or of any appointed official of the state or of any political subdivision thereof shall be reduced or shortened prior to the expiration of the term of office being held at the time of the adoption of the new constitution, or the salaries of any such official reduced prior to the expiration of the term of office being held at the time of the adoption of a new constitution; however, retention in office beyond the date of the general state election for state officials who will take office in 1976 shall depend upon the provisions of such constitution or upon provisions of law enacted pursuant thereto;

(3) The state capitol is removed or may be removed from Baton Rouge.

Section 5. A. The delegates chosen as herein provided shall

meet in convention in the Chamber of the House of Representatives at the state capitol, or at such other suitable location in the capital city as shall be determined by the governor, at 12:00 o'clock noon on Friday the fifth day of January, 1973. The chief justice, or in his absence any associate justice of the supreme court designated by said court, shall attend the convention at the opening thereof and shall preside until a presiding officer has been elected. The Secretary of State shall attend the opening of the convention and cali the roll of the delegates, whereupon the temporary presiding officer shall administer to the delegates the following oath:

"I hereby solemnly swear that I will support the constitution and laws of the United States; that I will well and faithfully perform all duties as a member of the convention, and that I will observe and obey the limitation of authority contained in the Act under which this convention has assembled. So help me God."

No delegate shall be qualified to serve as such unless and until he has taken and subscribed to the above oath.

B. After the oath has been administered the delegates shall proceed to effect the permanent organization of the convention and shall:

(1) adopt rules of procedure for the convention, which rules shall not be inconsistent with the provisions of this Act and which may, in the discretion of the convention, create and establish such substantive and procedural committees as the delegates may deem appropriate;

(2) elect from among their number a chairman, a vice chairman and such other officers as they deem necessary;

(3) elect from among their number an executive committee, the membership of which shall be determined by the delegates but which shall include among its members the chairman and vice chairman of the convention;

(4) take such other actions as they deem necessary to effect a permanent organization of the convention.

After completing these organizational activities the convention shall adjourn until July 5, 1973.

The rules of procedure adopted by the convention shall be subject to later change as the delegates shall provide therein. Provided, however, no delegate shall be allowed to vote by proxy.

C. As soon as possible after the members of the executive committee are elected, the executive committee shall employ a research director, research assistants and secretarial and/or clerical personnel in accordance with the provisions regarding

the composition and qualifications of such staff in Subsection D of this section and may also employ such other professional, research, technical, clerical and stenographic employees as the committee shall deem necessary. In addition, the committee shall prepare, as soon as possible, a budget of salaries and other anticipated expenses of the convention, based on the amount of the appropriation for the convention and any other funds available for expenditure.

D. The staff of the constitutional convention shall include, but not be limited to, the following who shall not be delegates to the convention except as provided in Paragraph (5) and (6) below:

(1) a director of research, who shall possess at least the qualifications outlined below for research assistants;

(2) fourteen research assistants, who shall possess the following qualifications:

(a) a bachelor's degree from an accredited college or university;

(b) not less than one year in an accredited law school or in substitute thereof, not less than two years work experience which shall include legal research or comparable work experience in a related field;

(c) is not an elected or appointed public official, except those listed below in Paragraphs (5) and (6);

(3) four research supervisors, who shall be the deans of the Louisiana State University, Tulane University, Loyola University and Southern University law schools, or a representative of any of such deans chosen by him from the faculty of the law school of which he is dean, all of whom shall serve without compensation;

(4) such secretarial and/or clerical personnel as the executive committee deems necessary and whose salaries shall be set by the executive committee;

(5) six members of the House of Representatives of the Legislature of Louisiana, who shall be appointed by the governor and who shall receive no compensation for such staff service.

(6) five members of the Louisiana Senate, who shall be appointed by the governor and who shall receive no compensation for such staff service.

(7) four members of the Louisiana State Law Institute, who shall be appointed by the governor and who shall receive no compensation;

E. The Secretary of State shall advertise for applicants for the staff of the constitutional convention and shall receive such applications for staff service prior to the first meeting of the convention. He shall present the applications he has received to the executive committee on the day the convention convenes. If the executive committee deems necessary it may receive additional applications after the convention convenes.

F. The convention also shall have full authority to use the facilities and services of any board, commission, department or agency of the state and of any political subdivision of the state, and all such agencies shall cooperate with the convention to the fullest extent in furnishing services, facilities and employees upon request. In addition, the convention may use the facilities and services of other persons and organizations.

G. The convention shall have full authority to accept grants, moneys, aid, facilities and/or services from public or private sources for the purpose of accomplishing its task of framing a new constitution and any such grants, moneys, facilities, services and donations, as well as the names of the donors thereof, shall be recorded in the record of the proceedings of the convention and such records shall be open to inspection by any person.

H. Working under the direction of the convention, the staff shall proceed immediately to perform the necessary research and to prepare a preliminary draft of a new constitution for the state. The staff shall complete this work on or before July 5, 1973.

I. The delegates shall reconvene July 5, 1973, to receive the report of the staff, to hold some public hearings and draft a proposed constitution for the state of Louisiana. The final draft shall be completed no later than January 4, 1974.

Section 6. The delegates to the convention shall receive a per diem of fifty dollars for each day of actual attendance at meetings of the convention or of committees thereof, but no delegate shall be paid a per diem after January 4, 1974. No delegate may accept any other compensation for work performed for the convention from any source while serving as a delegate and engaged in the work of the convention. However, where a delegate is engaged in regular, bona fide employment, should his employer choose to continue to pay the usual compensation while the delegate is engaged in the work of the convention, nothing herein shall prevent the said delegate from accepting that compensation.

Section 7. Any appropriation shall be used solely to defray the necessary expenses of the constitutional convention for which provision is made herein, including the payment of per diem of delegates, salaries and expenses of necessary em-

ployees, supplies, materials and equipment, printing and reproduction of materials and all other necessary expenses incurred in connection with said convention and its work in drafting a new constitution for the state of Louisiana.

Section 8. A. Any funds appropriated shall be withdrawn from the state treasury in accordance with warrants signed by the chairman of the convention, and all checks for the disbursement of funds shall be signed by the chairman and the vice chairman of the convention or by the chairman or vice chairman and such other person as shall be designated by the convention.

B. For so long as the convention remains in existence and for so long thereafter as is necessary to assure the payment of all expenses incurred in connection with the work of the convention, no unexpended portion of the funds herein appropriated shall ever revert to the state general fund. The convention shall not be deemed to be a budget unit of the state and therefore shall not be subject to the provisions of Chapter 1 of Title 39 of the Louisiana Revised Statutes. The financial books and records of the convention, however, shall be subject to audit by the legislative auditor.

Section 9. A. The convention shall submit a proposed draft of a new constitution for the state to the governor upon completion of its work. At the discretion of the convention it also may propose and submit at the same time such alternative provisions as it deems appropriate. The constitution as drafted by the convention, together with any alternative provisions proposed for submission, shall be submitted to the people for their adoption or rejection. Within thirty days after submission of the proposed draft to the governor, he shall by proclamation call an election, to be held at the same time as the next regularly scheduled general election or, at the governor's discretion, at a special election to be held at a time fixed by him in his proclamation prior to the next regularly scheduled general election, for the purpose of submitting the proposed draft to the people for their adoption or rejection.

The election shall be held and the results shall be promulgated under the general election laws of the state. All electors duly qualified to vote in this state at the time of the election shall be entitled to vote without regard to party affiliation in their respective precincts on the proposition for or against adoption of the constitution and on the question or questions of adoption of such alternative provisions as may be proposed by the convention.

B. The convention may submit to the electors of the state the proposal of acceptance or rejection of the constitution or any alternative proposals in such form and manner as it may determine and may direct the proper election officials to take

the necessary steps to effectuate the determination of the convention in presenting the proposal or alternate proposals to the electors.

C. The constitution, if ratified and adopted by the people in the election for which provision is made herein, including such alternative provisions as are adopted by the people at said election, shall become effective at twelve o'clock midnight on the thirtieth day after the date on which the Secretary of State promulgates the results of the election.

Section 10. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or applications, and to this end the provisions of this Act are hereby declared severable.

Section 11. All laws or parts of laws in conflict herewith are hereby repealed.

Section 12. The necessity for the immediate passage of this Act having been certified by the governor to the legislature while in session, in accordance with Section 27 of Article III of the Constitution of Louisiana, this Act shall become effective immediately upon approval by the Governor.

Approved by the Governor: May 26, 1972, at 10:47 a.m.

A true copy:

WADE O. MARTIN, JR.
Secretary of State.

Certified by the Governor as Emergency Legislation. May 26, 1972.

WADE O. MARTIN, JR.
Secretary of State.

B-3813, 6-72, 10M

APPENDIX "B"

SUPREME COURT OF THE UNITED STATES

No. 73-1998

Herman L. Driskell et al.,
Appellants,

versus

Edwin W. Edwards, Governor of Louisiana, et al.

APPEAL from the United States District Court for the Western District of Louisiana.

THIS CAUSE having been submitted on the statement of jurisdiction and motion to dismiss or affirm,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said United States District Court in this cause be, and the same is hereby, vacated; and that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of Louisiana with directions to enter a fresh decree from which a timely appeal may be taken to the Court of Appeals. See Wilson v. City of Port Lavaca, 391 U.S. 352 (1968).

October 15, 1974

Filed: Nov. 18, 1974

APPENDIX "C"

In the United States District Court for
the Western District of Louisiana
Monroe Division

Reverend Herman L. Driskell, Thomas R. Trainer and Robert L. Murphy, Individually and as member of class they represent

versus C.I. 74-339

Honorable Edwin W. Edwards, Governor of State of Louisiana; Honorable Wade O. Martin, Jr., Secretary of State of Louisiana; Honorable Mary Evelyn Parker, Treasurer of State of Louisiana; and Honorable Douglas Fowler, State Custodian of Voting Machines, State of Louisiana

HUNTER, JUDGE:

Act 2 of 1972 provided for a Constitutional Convention to meet on January 5, 1973, to frame a new constitution for the State of Louisiana. One hundred and five (105) of the One Hundred and thirty-two delegates were elected, and twenty-seven were appointed by the Governor. The function of the Convention was to propose and recommend to the electorate of Louisiana changes and alterations in the existing State Constitution. It had no law-making powers of any kind. It had no power to bind the people of Louisiana; its proposals can have no effect unless and until ratified by approval of the voters at the April 20, 1974, statewide election.

On April 5, 1974, plaintiffs brought this action to enjoin the April 20, 1974 election; and to have declared null and void Act 2 of the Louisiana Legislature of 1972, which provided for the Constitutional Convention. Plaintiffs contend that the existence of non-elected delegates deprived the voters of the State of equal representation to which they are entitled under the "equal protection" and "due process" clauses of the Fourteenth Amendment to the Constitution of the United States (the one man, one vote principle). They have petitioned that a three-judge court be convened pursuant to 28 U.S.C.A. § 2281. When an application for a statutory three-judge court is addressed to a district court, our inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute. If these three criteria are met, it is impermissible for a single judge to decide the merits of the case, either by granting or withholding relief. *Idlewilde Liquor Corp. v. Einstein*, 370 U.S. 713, 715, 82 S. Ct. 1294, 1296, 8 L. Ed. 2d 794 (1962).

There is no contention that the elected delegates were not chosen from districts apportioned in accordance with the one man, one vote guide-lines of the United States Supreme Court. Under these circumstances, the law is clear and unequivocal that the existence of non-elected delegates did not deprive the voters of Louisiana of equal representation to which they were entitled under the Constitution of the United States.

The single judge with whom a complaint is filed should not request the convening of a three-judge court where it is clear that no substantial federal question is presented. The highest courts in four states have held that the one man, one vote principle is not applicable to the election of members to a constitutional convention where the only authority of the members is to make proposals which can have no effect unless and until ratified by approval of the voters at a state-wide election. *West v. Carr*, 212 Tenn. 367, 370 S.W. 2d 469, cert. denied 378 U.S. 557; *Stander v. Kelley*, 403 Pa. Super 406, 250 A 474, cert. denied, 395 U.S. 827; *Livingston v. Ogilvie*, 43 Ill. 2d 9. The logic of these decisions has been well summarized by the Supreme Court of Tennessee, when it noted the difference between a legislative body and a constitutional convention:

> "This conclusion is reinforced when it is considered that neither the delegates nor the convention can take any final action, but are strictly limited to the subjects specified in the call, and as to them, can only make proposals which can have no effect unless and until they are ratified in another election by a vote of the people of the State at large, where every qualified voter will be entitled to vote and every vote given the same weight." West v. Carr, 370 S.W. 2d 469, 474.

The same conclusion was reached by the Louisiana Supreme Court in *Bates v. Edwards* (unreported). The Bates decision was rendered on April 3, 1974, and involved an identical attack on the statute here assailed.

The United States Supreme Court not only denied certiorari in *Carr* and *Kelley* (supra), but has affirmatively stated its own feelings that the one man, one vote principle does not apply to a combination of elected and appointed officials performing non-governmental functions at the state level. *Sailors, et al v. Board of Education*, 387 U.S. 105, declares:

> "We find no constitutional reason why state or local officers of the non-legislative character involved here may not be chosen by the governor, by the legislature, or by some other appointed means rather than by an election."
>
> * * *
>
> "At least as respects non-legislative officers, a state can appoint local officials or elect them or combine the elective and appointive systems as was done here * * *. Since the choice of members of the county school board did not involve an election and since none was required for these non-legislative offices, the principle of 'one man, one vote' has no relevancy."

The delegates to the Louisiana Constitutional Convention could not and did not take any final action. Their duties were limited to the subjects specified in the call. They were empowered only to make proposals which can have no effect unless and until they are ratified in an election by a vote of the people on April 20th. The delegates have no power to enact provisions of law having a binding effect. The elected delegates were chosen from districts apportioned in

compliance with the one man, one vote guide-lines of the United States Supreme Court. The existence of the appointed delegates did not dilute the vote of any citizen of the state. This conclusion is so clearly mandated by jurisprudence and common sense that contentions to the contrary are "obviously without merit" and "insubstantial."

Accordingly, we must find that no substantial federal constitutional question is presented and the motion to certify for the convening of a three-judge court must be denied.

There is another reason for declining the convocation of a three-judge court at this point in time. We must inquire whether the complaint alleges a basis for equitable relief. The granting of an injunction is appropriate whenever the policy of preserving the Court's power to decide the case effectively outweighs the risk of imposing an interim restraint. The reverse of that proposition exists here. If the Court declines, it still retains the power to decide the issues effectively, should they be brought before us in a separate suit after the April 20th election. On the other hand, if we granted the injunction we would have imposed an interim restraint which would, in effect, place irreparable injury on the State. The several millions of dollars which have already been spent on the Constitutional Convention would have been irretrievably lost. The statute under attack was enacted in 1972. This suit was not filed until April 5th of 1974. These facts, together with other balancing equities, persuade us that plaintiffs' petition does not set forth a basis for equitable relief required for the convening of a three-

judge court. When we balance the harm that granting the injunction would inflict on defendants with the threat of irreparable harm to plaintiffs, we find that the irreparable harm would accrue to defendants, not the plaintiffs.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

There is no disputed issue of fact in this case. Plaintiffs complain that the provision of Act 2 of 1972, which permitted the Governor to appoint 15 delegates to the Constitutional Convention to represent the public at large and 12 delegates to represent certain defined classes of Louisiana citizens, violates the Fourteenth Amendment to the United States Constitution. It is alleged that these appointed delegates "dilute the votes of the citizens in violation of the one man, one vote doctrine." For reasons heretofore stated, we find this contention is plainly insubstantial and without merit. In such a case the district judge has the power, and it is his duty, to dismiss. *California Water Service Co. v. Redding*, 304 U.S. at 254; Ex Parte Poresky, 290 U.S. at 32.

The motion for summary judgment is granted and the case is dismissed.[1]

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1 It should be emphasized that there is no attack here upon any provision of the Constitution itself, and this decision does not intimate any opinion in that regard. Any such complaint would be premature and must await the decision of the voters, now scheduled to be rendered at the April 20, 1974 statewide election.

Thus originally done and signed in Chambers in Lake Charles, Louisiana, on the 10th day of April, 1974 and, as such, reported in 374 F. Sup. 1 (1974).

Thus redone and signed in Chambers in Lake Charles, Louisiana, as a fresh decree on this the 5 day of November, 1974, in accordance with the following order rendered by the Supreme Court of the United States on the 15th day of October, 1974:

"RE: DRISKELL, ET AL. v. EDWARDS, GOVERNOR OF LOUISIANA, ET AL., 73-1998

" 'The judgment is vacated and the case is remanded to the United States District Court for the Western District of Louisiana with directions to enter a fresh decree from which a timely appeal may be taken to the Court of Appeals. See *Wilson* v. *City of Port Lavaca*, 391 U.S. 352 (1968).' "

/s/ EDWIN FORD HUNTER JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX "D"

Reverend Herman L. DRISKELL et al.,
Plaintiffs-Appellants,

v.

Honorable Edwin W. EDWARDS,
Governor, State of Louisiana, etc.,
et al., Defendants-Appellees.

No. 74-4020

United States Court of Appeals,
Fifth Circuit.

Sept. 5, 1975.

Appeal from the United States District Court for the Western District of Louisiana.

Before BROWN, Chief Judge, and GODBOLD and CLARK, Circuit Judges.

JOHN R. BROWN, Chief Judge:

This much-traveled case comes to us as an appeal from the determination by a single district judge that the constitutional attack before him did not need to be heard by a three-Judge Court because the question presented was insubstantial and the case inappropriate for injunctive relief. We reverse.

Act 2 of the 1972 Louisiana Legislature called a convention to convene January 5, 1973 and frame a new state constitution. One delegate was to be elected from each legislative district and a number of others were

to be appointed by the Governor — some to represent special interest groups and others from the public at large at his discretion.[1] One hundred and five delegates were elected and the remaining twenty-seven were appointed.[2]

When the convention closed on January 19, 1974 its business was complete. A proposed constitution was ready to be laid before the people for popular ratification in a state-wide election to be held on April 20, 1974.

On April 5, some two weeks before the election, the appellants filed this action. They sought a declaratory judgment, 28 U.S.C.A. § 2201, that Act 2 providing for the convention was void because the method of delegate selection did not comply with the "one person, one vote" doctrine and to enjoin the April 20 election. In addition, they asserted that under 28 U.S.C.A. § 2281[3] this claim must be heard by a three-Judge Court.

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1 Of the twenty-seven non-elected delegates 15 were to be appointed at large and of the remainder one each to represent industry, labor, education, civil service, wildlife and conservation, law enforcement, the judiciary, the professions, consumers, agriculture, youth and racial minorities.

2 Appellants assert in their post-argument brief that the Governor also appointed others to replace delegates who were elected but unable to serve.

3 28 U.S.C.A. § 2281 provides in pertinent part:

> "An interlocutory or permanent injunction restraining the enforcement operation or execution of any State Statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board of commission acting under State statutes, shall not be granted by a district court or judge thereof upon the ground of unconstitutionality of such statute

In a memorandum opinion and order dated April 10 the District Judge (i) held that no three-Judge Court was necessary because the federal constitutional question presented was insubstantial, (ii) injunctive relief was inappropriate because of the potential irreparable injury to the State represented by a wasted expenditure of several million dollars and (iii) granted the defendant state officials' motion for summary judgment.

Having lost the first round, appellants applied to Justice Powell, the Circuit Justice for the Fifth Circuit, for an injunction against the impending election. This application was denied April 18. On April 23, three days after the election,[4] a similar application by telegram was made to Justice Douglas. Once again injunctive relief was denied.

Appellants next petitioned the Supreme Court for a writ of certiorari. In response, the Court vacated the judgment of the District Court and ordered that Court to enter a new decree from which an appeal could be taken to the Court of Appeals — the time to do so having elapsed. This action cannot be construed to mean

unless the application therefore is heard and determined by a district court of three judges under Section 2284 of this title."

The Supreme Court has held that the three-Judge Court requirement is no less applicable when a state constitution rather than a state statute or administrative order is involved. *American Federation of Labor v. Watson*, 1946, 327 U.S. 582, 592-93, 66 S.Ct. 761, 766, 90 L.Ed. 873, 879-80. Here, the statute calling for a constitutional convention is attacked and sought to be enjoined. By doing so, of course, appellants call into question the constitution passed pursuant to it.

4 The proposed constitution submitted as a package on a take-it-or-leave-it basis was adopted by a vote of 360,980 for, with 262,676 against.

more than that the Court of Appeals was the proper court to entertain the appeal. *See Wilson v. City of Port Lavaca*, 1968, 391 U.S. 352, 88 S.Ct. 1502, 20 L.Ed.2d 636, cited by the Court in its order. And we so treat it. In accordance with the Supreme Court's direction the District Judge entered a new decree from which this appeal is taken.

Appellants make only one assertion that must be answered by us on this appeal. And that is whether the District Judge was correct in his determination that no three-Judge Court was necessary because the question presented was insubstantial. Although in doing so we fear we fly in the face of common sense, important practical considerations and the all but crystal clear state of the law itself, we must reluctantly conclude that the District Judge was wrong.

Our difficulty is that the Supreme Court has defined what constitutes an insubstantial federal question for purposes of deciding whether a three-Judge Court is necessary not once but several times in the strongest possible terms. The height of the hurdle that must be jumped can best be gauged by the following language from *Goosby v. Osser*, 1973, 409 U.S. 512, 518, 93 S.Ct. 854, 858, 35 L.Ed.2d 36, 42:

> "Constitutional insubstantiality for this purpose has been equated with such concepts as 'essentially fictitious,' *Bailey v. Patteson*, 369 U.S. 31, 33, 82 S.Ct. 549, 551, 7 L.Ed.2d 512 (1962), 'wholly insubstantial,' ibid, 'obviously frivolous,' *Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288, 30 S.Ct. 326, 327, 54 L.Ed. 482 (1910), 'obviously

without merit,' *Ex parte Poresky*, 290 U.S. 30, 32, 54 S.Ct. 3, 4-5, 78 L.Ed. 152 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous, previous decisions which merely render claims of doubtful or questionable merit do not render these insubstantial for the purposes of 28 U.S.C. Sec. 2281. A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' *Ex Parte Poresky*, 290 U.S. at 32, 54 S.Ct. 4."

If left to our own devices on a penetrating analysis of the factors involved we might well conclude that the contention that a convention whose only duty is to draw up a constitution and propose it for ratification by the people must be chosen in accordance with "one person, one vote" principles is unsound, indeed very unsound. But we could not in good faith say that such unsoundness "clearly results from the previous decisions of this [the Supreme] Court."[5]

5 Indeed, any assertion that an unequal protection taint can be cured by popular ratification has already been precluded by the Supreme Court. *See Lucas v. Colorado*, 1964, 377 U.S. 713, 736-37, 84 S.Ct. 1459, 1473-1474, 12 L.Ed.2d 632, 647-48; *West Virginia State Bd. of Educ. v. Barnette*, 1943, 319 U.S. 624, 638, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628, 1638.

Baker v. Carr, 1962, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, and its progeny do not themselves give us the answer. We know that

> [A]s a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election * * *.

Hadley v. Junior College District, 1970, 397 U.S. 50, 56, 90 S.Ct. 791, 795, 25 L.Ed.2d 45, 50-51. The Court has held a number of bodies to be ones that perform governmental functions — Congress, *Wesberry v. Sanders*, 1964, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481, state legislatures, *Reynolds v. Sims*, 1964, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, county commissioners court, *Avery v. Midland County*, 1968, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45, and public junior college board of trustees, *Hadley v. Junior College District*, *supra*. Unfortunately none of these cases[6] define governmental functions in such a way as to so wholly preclude the applicability of "one person, one vote"

6 However, in *Wells v. Edwards*, M.D. La. 1972, 347 F.Supp. 453, 455, affirmed 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679, Judge Gordon West speaking for a three-Judge Court stated

> ". . . But in Hadley, as in every other case that we can find dealing with the question of apportionment, the 'governmental functions' involved related to such things as making laws, levying and collecting taxes, issuing bonds, hiring and firing personnel, making contracts, collecting fees, operating schools, and generally managing and governing people. In other words, apportionment cases have always dealt with elected officials who performed legislative or executive type duties . . ."

principles to a constitutional convention as to make a contention to the contrary "obviously without merit." *Ex parte Poresky, supra*. Equally important, no one could challenge that a statutorily created constitution commission is engaged in what has to be a "governmental function" of the highest order. But that does not really answer the question whether from an operational sense is the function performed by such an assembly of nature properly calling for formalized participation by all segments through a fairly apportioned body.

We can find only one pronouncement from within the Supreme Court squarely on point. In *Fortson v. Toombs*, 1965, 379 U.S. 621, 626, 85 S.Ct. 598, 601, 13 L.Ed.2d 527, 531, Justice Harlan, joined by Justice Stewart in a special concurring-dissenting opinion, stated

> "As to the provisions forbidding submission to the electorate of a legislatively proposed new state constitution, I can find nothing in the Fourteenth Amendment, elsewhere in the Constitution, or in any decision of this Court, which requires a State to *initiate* complete or partial constitutional change only by some method in which every voice in the voting population is given an opportunity to express itself. Can there be the slightest constitutional doubt that a State may lodge the power to initiate constitutional changes in any select body it pleases, such as a committee of the legislature, a group of constitutional lawyers, or even a 'malapportioned' legislature . . ."

But this is no holding.

Still, it is our view that the search need not stop with the United States Reports, Supreme Court Reporter or Lawyer's Edition — First or Second. In spite of its almost airtight language the Supreme Court surely expects to be read in some way more intelligent than just total literalism. An especially fertile imagination is not necessary to conceive of legal questions whose insubstantiality while not clearly resulting from previous Supreme Court decisions must be obvious to all. Because we believe that the question before us on this appeal comes so close to being one of patently evident insubstantiality we, with the assistance of counsel, have searched high and low for cases on point — not for their precedential value but for guidance. Our search has not been particularly fruitful.

On the federal side, in one three-Judge Court opinion we have found some suggestion, although it is far from clear, that a state constitution must be proposed to the people by a body chosen in line with "one person, one vote" principles.[7] *Butterworth v. Dempsey*, D.Conn. 1964, 237 F.Supp. 302, 308.

State Court decisions muddy the waters even further. There are six state Supreme Court opinions that speak to the problem.

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7 In its Judgment the Court ordered "[a]ppropriate provision for amending the state constitution not in contravention of the United States Constitution." 237 F.Supp. at 305. The Court explained that the order "contemplates . . . the General Assembly . . . will enact . . . an appropriate statute for election of delegates to a Constitutional Convention at a special or regular election . . . ." *Id.* at 308. The Court had earlier found the Connecticut legislature to be malapportioned. 229 F.Supp. 754. This determination had been affirmed by the Supreme Court in memorandum opinion. *Pinney v. Butterworth*, 1964, 378 U.S. 564, 84 S.Ct. 1918, 12 L.Ed.2d 1037.

In three of them an attack on a constitutional convention similar to the one before us today was rejected. *West v. Carr*, 1963, 212 Tenn. 367, 370 S.W.2d 469, cert. denied, 378 U.S. 557, 84 S.Ct. 1908, 12 L.Ed.2d 1034; *Stander v. Kelley*, 1969, 433 Pa. 406, 250 A.2d 474, cert. denied, sub nom. *Lindsay v. Kelley*, 395 U.S. 827, 89 S.Ct. 2130, 23 L.Ed.2d 738; *Livingston v. Ogilvie*, 1969, 43 Ill.2d 9, 250 N.E.2d 138. We are informed by counsel that a fourth, an unreported Louisiana Supreme Court opinion, also held "one person, one vote" principles inapplicable to constitutional conventions.

The other three, two of them advisory opinions to the Governor or legislature or Rhode Island, directed that the selection of delegates to the convention must be by popular election. *Jackman v. Bodine*, 1964, 43 N.J. 453, 205 A.2d 713; *Opinion to the House of Representatives*, 1965, 99 R.I. 377, 208 A.2d 713; *In re Constitutional Convention*, 1935, 55 R.I. 46, 178 A. 433. We find no mention of the Fourteenth Amendment in any of the opinions requiring popular election. On the other hand, in *Stander v. Kelley* and *West v. Carr*, neither of which piqued the interest of the Supreme Court sufficiently to grant certiorari, the equal protection argument was made and it was rejected.

None of these cases, of course, are binding on us and they are not sufficiently persuasive to simplify our task. That throws us back on our own powers of analysis. And those powers tell us that although the convention passed no laws, levied no taxes, ran no schools and created no binding obligations for the state of Louisiana, we cannot say that the question can surmount the *Goosby-Poresky* hurdle, expressed as it is

in stringent terms. The question may be constitutionally insubstantial but this insubstantiality is not so obvious as to make a three-Judge Court determination unnecessary.

Because we address solely the question of the need for a three-Judge Court our views on the ultimate problem have no effect as stare decisis law of the case or otherwise, on either the three-Judge Court or another panel of this Court if the appeal comes here rather than to the Supreme Court.[8] But we do wish to make clear that there is not the slightest suggestion of a whisper intimating that the system fashioned by Louisiana is constitutionally defective and that this new constitution will be struck down. What — and all — we hold is that the three-Judge Court statute which has outlived its need and which creates problems daily beyond the administrative imagination of Justices and Judges compels that another group of three Judges — not this panel of three Judges — must first decide the issue.

The District Court's order is vacated and the case is remanded for a determination by a three-Judge Court whether Act 2 of the 1972 Louisiana Legislature violates the Fourteenth Amendment in the particulars charged.[9]

Remanded.

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8 No one can predict now who should review this case on its next appearance. *See Sumter County Democratic Executive Committee v. Dearman*, 5 Cir., 1975, 514 F.2d 1168, at 1170 [1975, at 6119]. *See also MTM, Inc. v. Baxley*, 1975, 420 U.S. 799, 85 S.Ct. 1278, 43 L.Ed.2d 636; *Gonzalez v. Employees Credit Union*, 1975, 419 U.S. 90, 95 S.Ct. 289, 42 L.Ed.2d 249.

9 Since the Chief Judge is a member of the panel, no formal request to convene a three-Judge Court is necessary. The Court will be convened by separate order simultaneously with the release of this opinion.

United States Court of Appeals
For the Fifth Circuit

October Term, 1974

No. 74-4020

D. C. Docket No. CA-74-339

Reverend Herman L. Driskell, Et Al.,
Plaintiffs-Appellants,

versus

Honorable Edwin W. Edwards, Governor,
State of Louisiana, Etc., Et Al.,
Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Louisiana

Before BROWN, Chief Judge, and GODBOLD and
CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

September 5, 1975

Issued as Mandate: Sep. 29, 1975

APPENDIX "E"

In the United States District Court for the
Western District of Louisiana, Monroe Division

Civil Action
No. 74-339

Rev. Herman L. Driskell, Thomas R. Trainer and
Robert L. Murphy

versus

Honorable Edwin W. Edwards, Governor, State of Louisiana; Honorable Wade O. Martin, Jr., Secretary of State, State of Louisiana; Honorable Mary Evelyn Parker, Treasurer, State of Louisiana; and Honorable Douglas Fowler, State Custodian of Voting Machines, State of Louisiana.

Before AINSWORTH, Circuit Judge, DAWKINS, Senior District Judge, and SCOTT, District Judge.

OPINION

Plaintiffs bring this suit challenging the constitutionality of Act 2 of 1972 of the Louisiana Legislature which provided for a Constitutional Convention to frame a new State Constitution. The Act called for the election of 105 delegates, one from each legislative district, and 27 delegates to be appointed by the Governor to represent specified groups of citizens.[1] Elections were held for the 105 elected delegates, the Governor appointed the remaining 27 delegates, and the Convention (commonly referred to as "CC-73") convened on January 5, 1973.[2] Proceedings were held at various intervals until January 19, 1974, when the proposed new Constitution was finally ready to be submitted to the voters for ratification. The ratification election was scheduled for April 20, 1974. On April 5, 1974, two weeks before the scheduled election, plaintiffs filed this suit seeking to declare null and void Act 2 of 1972 and to enjoin the April 20 election.

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1 Section 1 of Act 2 provides in part:

"A. (1) . . . One delegate shall be appointed by the governor to represent each of the following: industry, labor, education, civil service, wildlife and conservation, law enforcement, the judiciary, the professions, consumers, agriculture, youth and racial minorities. Fifteen additional delegates shall be appointed by the governor from the public at large."

2 During the course of the convention, four other delegates were appointed by the governor to replace four elected delegates who resigned. This is provided for in Section 3 of the Act.

A single judge of the District Court for the Western District of Louisiana denied the request for convening of a Three-Judge Court, holding that the case did not present substantial constitutional issues. He then dismissed the case on the merits. Plaintiffs applied to Justice Powell and then to Justice Douglas for an injunction to stop the April 20 election, which application was denied. The election was held as scheduled on April 20, 1974 and the voters of Louisiana ratified the proposed Constitution by a vote of 360,980 for to 262,676 against. Plaintiffs next appealed to the United States Supreme Court, which ordered the District Court's judgment vacated and a fresh decree entered from which a timely appeal could be taken to the Court of Appeals. Such fresh decree was entered by the District Court, and plaintiffs prosecuted an appeal to the Fifth Circuit Court of Appeals. On September 5, 1975 the Fifth Circuit vacated the District Court's judgment, remanded the case back to the District Court for further proceedings, and convened a Three-Judge Court to consider the case on the merits. The Fifth Circuit's decision did not reach the merits of the case, but held only that a Three-Judge Court was required since the issues were not "clearly insubstantial". *Driskell v. Edwards*, ___ F.2d ___ (5th Cir. 1975).

Plaintiffs' complaint asserts that by allowing the Governor to appoint 27 of the 132 delegates to the Convention, Act 2 violated the one-man, one-vote principle mandated by the Fourteenth Amendment to the United States Constitution. Plaintiffs take no issue with the manner in which the 105 elected delegates were elected. Their argument asserts that the presence of 27 appointed delegates, having equal voting strength in the Convention with the elected delegates,

gives an unequal voice to the members of the various groups represented by the appointed delegates, thereby violating one-man, one-vote.

The issue thus framed requires the Court to direct its attention to two questions. In the first instance, we must decide whether a Constitutional Convention of the type called in Louisiana is a body whose members are required to be elected in accordance with the principle of one-man, one-vote. If this question is answered affirmatively, we must then decide whether the procedure actually used to select delegates to CC-73 violates that principle.

Our search for an answer to the first question has not led us to any direct authority binding upon this Court. We have, however, been directed to a number of cases which provide persuasive guidance.

As a general rule, whenever a body of persons is to be elected by popular vote to carry out governmental functions, the election must be conducted according to the principles of the Fourteenth Amendment, including the principle of one-man, one-vote. *Baker v. Carr*, 369 U.S. 186, 7 L.Ed.2d 663, 82 S.Ct. 691 (1962); *Hadley v. Junior College District*, 397 U.S. 50, 25 L.Ed.2d 45, 90 S.Ct. 791 (1970). A number of bodies have been held to be ones which perform governmental functions, and to which one-man, one-vote applied, e.g. Congress, in *Wesberry v. Sanders*, 376 U.S. 1, 11 L.Ed.2d 481, 84 S.Ct. 526 (1964); State Legislatures, in *Reynolds v. Sims*, 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362 (1964); and County Commissioners Court, in *Avery v. Midland County*, 390 U.S. 474, 20 L.Ed.2d 45, 88 S.Ct. 1184 (1968).

None of these cases define "governmental functions" in such a way as to clearly exempt a Constitutional Convention from the application of one-man, one-vote. Neither is it tenable to argue that a Constitutional Convention is not exercising a governmental function of the highest order, i.e. reform of the organic law of the State. The question resolves into a query whether the governmental function being exercised by the Convention is of a nature properly requiring formalized participation by all segments of the population through a fairly-apportioned body.

One common characteristic exists in all the cases requiring a public body to be elected under the one-man, one-vote principle; all the bodies whose makeup was under scrutiny exercised legislative functions. When bodies such as Congress, a State Legislature or a County Commission pass an Act, it ordinarily takes on the force of law without the necessity of approval by the people. This is true because, under our theory of government, the people have delegated to the legislative bodies a certain portion of their sovereignty, the authority to draft and make laws. A Constitutional Convention, on the other hand, exercises no sovereign authority. The people have delegated to the members of the Convention nothing more than the authority to propose changes in the organic law. No Act of the Convention takes on the force of law unless and until ratified by the people in a referendum election.

This crucial distinction between the function of a legislative body and a Constitutional Convention was certainly present in the instant case. Section 4 of Act 2

clearly defines and limits the authority of the Convention.

> "The Convention shall have full authority to frame a new Constitution for the State . . . which shall be submitted to the electors of the State for their approval or rejection . . .".

Section 9 of Act 2 provides for the submission of the proposed Constitution to the people for their adoption or rejection and further provides:

> "C. The Constitution, *if ratified and adopted by the people* . . . shall become effective . . .". (Emphasis added).

Thus, it is clear that the delegates to CC-73 exercised no function other than to draft proposed changes to Louisiana's Constitution, which proposals would be submitted to the people for approval or rejection, and would become law only if ratified by the people.

As noted above, we find no direct authority on the question, but we do find several cases having persuasive authority. In *West v. Carr*, 370 S.W.2d 469 (Tenn. 1963), *cert. denied* 378 U.S. 557, 12 L.Ed.2d 1034, 84 S.Ct. 1908, the Supreme Court of Tennessee considered a challenge to Tennessee's Constitutional Convention similar to the challenge in the instant case. In ruling that the Fourteenth Amendment did not require members of a Convention to be elected under the principle of one-man, one-vote, that Court noted:

> "Thus, the Legislature has the final power *to make law*.

> "A Constitutional Convention, however, has no power to take any final action, but can only propose constitutional changes for ratification or rejection by the people. This Act as well as the Convention it provides for, is merely part of the machinery of the amending process." (Emphasis original, 370 S.W.2d at 472).

The Pennsylvania Supreme Court also considered the issue in *Stander v. Kelley*, 250 Atl.2d 474, (Pa. 1969), *cert. denied sub nom. Lindsay v. Kelley*, 395 U.S. 827, 23 L.Ed.2d 738, 89 S.Ct. 2130 (1970). That court answered the issue in the same manner as did the Tennessee Supreme Court:

> "The function of the Constitutional Convention was to propose and *recommend* to the electorate of Pennsylvania changes and alterations in the State Constitution. The Convention had no law-making powers of any kind . . . The approval or disapproval of the Constitutional Convention's proposed amendments . . . was submitted to the electorate of Pennsylvania solely on a statewide basis, which is the purest form of 'one-man, one-vote'. If the Convention which submitted the proposals did not represent all the voters of the State equally, this defect was clearly cured by the approval of the voters at the . . . statewide election." (Emphasis original). 250 Atl.2d at 481.

"Since the delegates to the Constitutional Convention had no power to bind the people,

> and since a majority of the electorate of Pennsylvania voted to adopt the (proposed amendment) the appellants cannot claim injury or constitutional infirmity in the manner in which the delegates were chosen." 250 Atl.2d at 481.

In *Livingston v. Ogilvie*, 250 N.E.2d 138 (Ill. 1969), the Illinois Supreme Court, citing *West v. Carr*, and *Lindsay v. Kelley*, decided a similar challenge to the Illinois Constitutional Convention in the same manner. The Court there held, as had the Supreme Courts of Tennessee and Pennsylvania, that the one-man, one-vote principle was not applicable to a Constitutional Convention whose members only recommend changes in the Constitution to the people for ratification. In *Butterworth v. Dempsey*, 237 F.Supp 302 (D. Conn. 1964), the Three-Judge Court was concerned with problems of malapportionment of the Legislature which required constitutional changes and a Constitutional Convention to effect those changes. Thus, the holding there, concerned as it is with issues of legislative reapportionment not present in the instant case, is not apposite authority for our purposes.

On the basis of the foregoing, we find that the principles of one-man, one vote had no application to the selection of delegates to the Louisiana Constitutional Convention of 1973. Thus, plaintiffs have no grounds for attacking Act 2 of 1972 on this basis. Because we so find, there is no need for us to consider the second part of this issue, i.e. whether the manner actually used in Louisiana to select delegates to CC-73 violated one-

man, one-vote. Since plaintiffs' case is without merit, it is hereby ordered dismissed.

DONE AND SIGNED this 15th day of January, 1976.

/s/ ROBERT A. AINSWORTH, JR.
ROBERT A. AINSWORTH, JR.
CIRCUIT JUDGE
/s/ BEN C. DAWKINS, JR.
BEN C. DAWKINS, JR.
SENIOR DISTRICT JUDGE
/s/ NAUMAN S. SCOTT
NAUMAN S. SCOTT
DISTRICT JUDGE

ORDER

(Caption Omitted)

Filed: Jan. 19, 1976

Plaintiff has filed a motion to recuse the three judges appointed to constitute this court. The motion makes the bare assertion that since all three judges are citizens of Louisiana, and thereby subject to the new Constitution, they will not be able to render fair and objective consideration to the issues in the case.

After the court was originally constituted, Chief Judge Edwin F. Hunter, Jr. of the Western District of Louisiana, recused himself since he was the judge who rendered the original opinion denying a three-judge

court and dismissing the complaint. Thereafter, Judge Ben C. Dawkins, Jr. was appointed to take the place of Judge Hunter. We find that the reasons which led to Judge Hunter's recusal are not present in the case of the other three judges. Even though all three are Louisiana citizens, none has heard argument or considered the case in anyway prior to the appointment to this particular three-judge court. None of the three has preconceived ideas as to the merits of the case. No reason exists why the three members of this court cannot give fair and objective consideration to the merits of the case. We therefore deny plaintiff's motion to recuse.

DONE AND SIGNED this 15th day of January, 1976.

/s/ ROBERT A. AINSWORTH, JR.
ROBERT A. AINSWORTH, JR.
CIRCUIT JUDGE
/s/ BEN C. DAWKINS, JR.
BEN C. DAWKINS, JR.
SENIOR DISTRICT JUDGE
/s/ NAUMAN S. SCOTT
NAUMAN S. SCOTT
DISTRICT JUDGE

APPENDIX "F"

In the District Court of the
United States for the Western
District of Louisiana
Monroe Division
(Three Judge Court)

Rev. Herman L. Driskell, Thomas R. Trainer and Robert L. Murphy

versus C.A. No. 74-339

Honorable Edwin W. Edwards, Governor, State of Louisiana; Honorable Wade O. Martin, Jr. Secretary of State; Honorable Mary Evelyn Parker, Treasurer, State of Louisiana; and Honorable Douglas Fowler, State Custodian of Voting Machines, State of Louisiana

NOTICE OF APPEAL

Filed: Feb. 13, 1976

Notice is hereby given that REV. HERMAN L. DRISKELL, THOMAS R. TRAINER and ROBERT L. MURPHY, Plaintiffs, appeal to the Supreme Court of the United States pursuant to 28 U.S.C. Section 1253 from a decision of the United States District Court for the Western District of Louisiana, sitting as a Three Judge Court, dated January 15, 1976, which denied plaintiffs' demand for an injunction enjoining the enforcement of the Louisiana Constitution of 1974 and the expenditure of funds pursuant to Act 2 of 1972 of the Louisiana Legislature and dismissed plaintiffs' suit and denied plaintiffs' motion to recuse the three judges hearing the matter.

/s/ JERRY L. FINLEY
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In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1356

REV. HERMAN L. DRISKELL, THOMAS R. TRAINER AND ROBERT L. MURPHY,

Appellants,

v.

HONORABLE EDWIN W. EDWARDS, GOVERNOR, STATE OF LOUISIANA; HONORABLE WADE O. MARTIN, JR., SECRETARY OF STATE, STATE OF LOUISIANA; HONORABLE MARY EVELYN PARKER, TREASURER, STATE OF LOUISIANA; AND HONORABLE DOUGLAS FOWLER, STATE CUSTODIAN OF VOTING MACHINES, STATE OF LOUISIANA,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

MOTION TO DISMISS OR AFFIRM

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April 12th, 1976

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In the Supreme Court of the United States

OCTOBER TERM, 1975

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REV. HERMAN L. DRISKELL, THOMAS R. TRAINER AND ROBERT L. MURPHY,
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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move the Court to dismiss the appeal herein or, in the alternative, to affirm the final judgment and decree of the District Court on the ground that it is manifest that the questions on which the cause depends are so unsubstantial as not to need any further argument.

STATEMENT

This is a direct appeal from the final judgment

and decree entered on January 15, 1976, by a District Court of three Judges, specially constituted pursuant to 28 U.S.C. 2281 and 2284, dismissing appellants' complaint.[1]

No evidence was taken in this case. At the request of the Court below, the following joint stipulation of facts was filed on the 15th day of September, 1975:

> "By Act 2 of 1972, the Louisiana Legislature provided a procedure for calling and holding a constitutional convention. The act provided for the election of 105 delegates to the convention, being one each from the districts from which members of the House of Representatives of the Louisiana Legislature were elected at their last election for members of that body. Additionally, one delegate was to be appointed by the Governor to represent each of the following: industry, labor, education, civil service, wildlife and conservation, law enforcement, the judiciary, the professions, consumers, agriculture, youth and racial minorities; and fifteen delegates were to be appointed by the Governor from the public at

[1] In the words of Chief Judge John R. Brown, United States Court of Appeals, Fifth Circuit, "This [is a] much-traveled case." Its journey is—Driskell et al v. Edwards et al, 374 F Supp 1, W.D. LA. (April 10th, 1974); United States Supreme Court A.999 (April 19th and 24th, 1974); 419 U.S. 812 (October 15th, 1974); C.I. 74-339 [unreported] W.D.LA. (November 5th, 1974); 518 F.2d 890 C.A.5, (September 5th, 1975); 74-339 W.D.LA. [unreported] [three judge District Court] (January 15th, 1976.) The journey for its companion was shorter. Bates et al vs. Edwards et al, 249 So.2d 532, S.C.LA. (April 3rd and 5th, 1974); 419 U.S. 811 (October 15th, 1974)

large. The qualifications required that each delegate be an elector of the State of Louisiana. The elected delegates were to be residents of the district from which they qualified as a candidate. Having been declared emergency legislation, the act became effective on May 26, 1972.

"Upon the completion of the usual qualifying, campaigning, elections and run-off elections, the 105 delegates chosen by the people joined with the 27 delegates appointed by the Governor and conducted convention proceedings for 122 days between January 5th, 1973 and January 19th, 1974. [During this same period, 4 delegates were appointed by the Governor to replace elected delegates who had resigned for one reason or another.]

"After standing mute for almost two years during the happening of the foregoing events, plaintiffs filed these proceeding on Friday, April 5th, 1974, two weeks before the election on the proposed constitution was to be held.

"Defendants, on the same day this suit was commenced, moved for an order denying the application for a three judge court because of the insubstantiality of the federal questions, and moved for a summary judgment. [An answer was also filed due to the critical time factor involved.]

"The district court, after a hearing thereon, granted each of defendants' motions. Plaintiffs' application for injunction was denied by Justice Powell [A999]. (On April 19, 1974, the following message was sent: '5045379275 TDBN Baton

Rouge La. 25 04–19 0529P EDT PMS Justice William O'Douglas, *(sic)* DLR US Supreme Court Washington DC 20543 Urgent. Please review Rev Driskell etal versus Edwards etal A999 and issue in junction. Imperative before Saturday to avoid loss of my clients constitutional rights. Jerry Finley Attorney.' On April 23, 1974, the following message was sent: 'PMS Mr. Blondell, Clerks Office U S Supreme Court Washington DC 20543 Refer Rev Driskell et al versus Edwards et al to Justice Douglas Jerry Finley attorney,' across the face of which is inscribed: 'Application Denied WOD 4/24/74.') The election was held on April 20th, 1974, with the following results:

"Adoption of the Proposed 1974 Constitution

For	360,980
Against	262,676

This constitution provides for the continuation of many of the provisions of the 1921 constitution as statutes.

"Plaintiffs then filed a jurisdictional statement with the United States Supreme Court.

"Defendants filed a motion to dismiss or affirm contending that mandamus to convene a three judge court is the appropriate remedy to protect the prospective jurisdiction of the Supreme Court, not by appeal, and that the appeal relative to the summary judgment should be to the Court of Appeals. On October 15th, 1974, the Supreme Court vacated the judgment of the district court and remanded the case to the United States District Court for the Western

District of Louisiana with directions to issue a fresh decree from which a timely appeal could be taken. Plaintiffs' notice of appeal to this Court was filed with the District Court on November 29, 1974. Defendants then filed a motion to expedite appeal to which plaintiffs consented. The motion was granted.

"After argument, both oral and in writing, the United States Court of Appeals, 5th Circuit, on September 5th, 1975, vacated and remanded this case to the District Court and, simultaneously therewith, convened a three-judge District Court."

ARGUMENT

THE MOTION TO DISMISS SHOULD BE GRANTED.

"* * * when a three-judge court denies a plaintiff injunctive relief on grounds which, if sound, would have justified dissolution of the court as to that plaintiff, * * * review of the denial is available only in the court of appeals."

Gonzalez v. Automatic Employees Credit Union, 419 US 90, 101. (1974)

THE MOTION TO AFFIRM SHOULD BE GRANTED.

The decision of the District Court is plainly correct.

By the first question presented, appellants suggest that the appointment of twenty seven delegates casts constitutional doubt on the validity of the proceedings by which Louisiana's constitution was

framed. The "one man, one vote" principle had its inception in *Baker v. Carr*, 369 U.S. 186, (1962). Since that time it has been applied to congressional elections, *Wesberry v. Sanders*, 376 U.S. 1 (1964); state legislatures, *Reynolds v. Sims*, 377 U.S. 533 (1964); local government elections, *Avery v. Midland County*, 390 U.S. 474 (1968); and to school districts, *Hadley v. Junior College District of Metropolitan Kansas City, Missouri*, 397 U.S. 50 (1970). It does not apply to the judiciary, *Wells v. Edwards*, 347 F.Supp. 453 (M.D. La. 1972), affirmed 409 U.S. 1095 (1973).

Hadley v. Junior College District, supra, sets forth a general rule as to when the "one man, one vote" principle applies. The court stated at 397 U.S. 50, 56:

> "* * * We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials * * *"

What are governmental functions? The court in *Wells v. Edwards*, supra, stated at page 455:

> "* * * But in Hadley, as in every other case that we can find dealing with the question of apportionment, the 'governmental functions' involved related to such things as making laws, levying and collecting taxes, issuing bonds, hiring and firing personnel, making contracts, collecting fees, operating schools, and generally managing and governing people. In other words, apportionment cases have always dealt with elected officials who performed legislative or executive type duties * * *."

Louisiana's constitutional convention had no power to make laws, levy taxes or enforce laws. It simply framed, for submission to the people, a proposed constitution. The delegates performed no legislative or executive type duties and were, therefore, not subject to the teachings of *Baker v. Carr*.

The apportionment cases do not establish the right to vote on every official who holds public office or performs a public function. In *Sailors v. Board of Education of the County of Kent*, 387 U.S. 105 (1967), the court at 110, declared:

> "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation. At least as respects nonlegislative officers, a State can appoint local officials or elect them or combine the elective and appointive systems as was done here * * *."

[Cf. *West v. Carr*, 212 Tenn. 367, 370 S.W. 2d 469, cert. denied 378 U.S. 557 (1964); and *Stander v. Kelley*, 403 Pa. 406, 250 A 474, cert. denied, *sub nom. Lindsay v. Kelley*, 395 U.S. 827. (1969)]

The *Sailors* decision followed by two years the

Fortson decision wherein Justice Harlan, as joined by Justice Stewart, had this to say:

> "As to the provisions forbidding submission to the electorate of a legislatively proposed new state constitution, I can find nothing in the Fourteenth Amendment, elsewhere in the Constitution, or in any decision of this Court, which requires a State to *initiate* complete or partial constitutional change only by some method in which every voice in the voting population is given an opportunity to express itself. Can there be the slightest constitutional doubt that a State may lodge the power to initiate constitutional changes in any select body it pleases, such as a committee of the legislature, a group of constitutional lawyers, or even a 'malapportioned' legislature—particularly one whose composition was considered, prior to this Court's reapportionment pronouncements of June 15, 1964, to be entirely and solely a matter of state concern?[3]
>
> "* * *
>
> [*Fortson v. Toombs*,
> 379 U.S. 621, 626.
> (1965)
> Concurring in part,
> Dissenting in part]

[3] If, as I believe, a State is not federally restricted in its choice of means for initiating constitutional change, the question of whether, under Georgia law, the proposed new Georgia Constitution should have been initiated by a popularly elected convention instead of by the legislature is not a matter for federal cognizance."

By their second question presented, appellants suggest that Louisiana no longer has a republican form of government. By the Act of Congress of the 8th of April, 1812 [2 U.S. Stat. 701], Louisiana was admitted into the Union "on an equal footing with the original states in all respect whatsoever." The enabling Act [2 U.S. Stat. 641] was superseded by the Louisiana State Constitution of 1812. *Permoli v. Municipality No. 1 of the City of New Orleans* 44 U.S. (3 How.) 589 (1845). Four years later this Court, in discussing the Fourth Section of the Fourth Article of the Constitution of the United States, declared:

> "Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal."
>
> *Luther v. Borden*
> 48 U.S. (7 How.) 1, 42.
> (1849)

Thus, whether Act 2 of 1972 violates §4 of Article 4 of the Constitution of the United States is not a

judicial but a political question committed to Congress. *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1916).

CONCLUSION

Appellees respectfully urge this Court to dismiss this appeal or, in the alternative, to affirm the decision of the Court below.

Respectfully submitted,

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